Filed 11/23/09 Winston v. Taxi Productions CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CLIFTON WINSTON, Plaintiff and Appellant, v. TAXI PRODUCTIONS, INC., et al., Defendants and Appellants.	B211082 c/w B209600 (Los Angeles County Super. Ct. No. BC386366)

APPEALS from orders of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed in part and reversed in part.

The Hill Law Firm and Michelle E. Hill for Plaintiff and Appellant.

Sidley Austin, Stephen G. Contopulos, Frank J. Broccolo, and Johari N. Townes for Defendants and Appellants.

Clifton Winston (Winston) brought this action for defamation and intentional infliction of emotional distress against Taxi Productions, Inc. (Taxi), 102.3 FM KJLH Radio Broadcasting (KJLH), Lawrence Williams (Williams), Janine Haydel (Haydel), Aundrae Russell (Russell), and Stevland Morris (Morris) (collectively "defendants") after KJLH aired portions of a voicemail message the station received from an unknown caller.[1] Taxi and Williams appeal from an order denying their special motion to strike, brought pursuant to Code of Civil Procedure section 425.16 (section 425.16). Winston cross-appeals from the court's order granting the special motion to strike as to Haydel and Russell. Morris filed a separate special motion to strike which was granted and became the subject of a separate appeal. On our own motion, we consolidate the appeals.

We find that Winston has not shown a probability of success on his claims of defamation and intentional infliction of emotional distress (IIED) against the defendants. Therefore, we affirm the trial court's orders granting the special motions to strike filed by Haydel, Russell, and Morris, and we reverse the trial court's order denying the special motion to strike as to Taxi and Williams.

CONTENTIONS

Taxi and Williams argue that the trial court's order denying their special motion to strike should be reversed because Winston has failed to show a probability of success on the merits as a matter of law. Specifically, Taxi and Williams contend that Winston has failed to show (1) that he was the subject of the broadcast, and (2) that Taxi and Williams acted with the required "actual malice." Taxi and Williams also challenge several evidentiary rulings made by the trial court.

Winston argues that the order granting the motion as to Haydel and Russell should be reversed. He claims that, contrary to the court's decision, Haydel and Russell were

---

[1] For the purposes of this appeal, the parties agree that KJLH and Taxi are a single business entity. Morris is the sole owner and operator of Taxi (doing business as KJLH Radio Broadcasting). Williams, who is employed as a radio personality on KJLH, aired the voicemail on April 18, 2007 (the broadcast). Haydel was also a radio personality employed by KJLH, and was on the air with Williams at the time of the broadcast. Russell is a program director at KJLH.

responsible for the publication of the allegedly defamatory broadcast. Winston makes the same arguments as to Morris.

FACTUAL BACKGROUND

Williams was a host of an afternoon broadcast on KJLH, which aired weekdays from 3:00 p.m. to 7:00 p.m. Since 2005, Williams had been including a daily segment during which the hosts would discuss topics of interest with listeners. Listeners could write letters, send emails, or call a hotline to voice their opinions on the topic under discussion.

On April 17, 2007, Williams received a telephone message from an unknown caller. The caller claimed that she was pregnant from an affair with a "prominent" married man that the station had previously employed who was currently "on the radio." The caller claimed that the man was now ignoring her, and stated that the call was a "last resort" to get his attention. The message did not identify the caller or the man with whom she had been involved.

On April 18, 2007, at 3:30 p.m. and again at 4:30 p.m., Williams broadcasted the voicemail message in order to encourage debate among the listeners about the consequences of marital infidelity and unplanned pregnancy. The caller's voice was distorted to protect her privacy. The second broadcast was aired because the hosts received feedback that the voice was overly distorted, thus incomprehensible, the first time it was played. The recorded voice states:

> "Okay, so here is my situation, so for the last five years, I have been having an affair with a very prominent man in this town, in LA. He is on the radio, and this is I guess, a last resort to try to get his attention. Like I said, this has been going on for the last five years. Yes, he is married and he would tell me that he and his wife were having problems and they were headed for a divorce. And now, I can't get him on the phone. He won't answer my calls. He has people there screening his calls. He is still on the radio. In fact, he used to work for you guys a little while ago. And now I am six months pregnant. What am I supposed to do now? He's ignoring me, and I can't get through to him; he won't call me back. He is not stepping up to his responsibilities. Am I supposed to raise this child by myself? Is that right? What am I supposed to do and how do I get to him? I did not want to make this call, but as a last resort what do I do? It's his

> child. He's going on with his career, I don't want to destroy that, but this is his child. What am I supposed to do? And the only reason why I am calling you guys because I listen and he used to work for you guys, so I need some kind of help or advice or someone to tell me if I am wrong. Should I just raise the child by myself? He's the only man I've been with, I am not with anyone. I know I'm wrong, but I miss him and he is ignoring me. So, tell me what am I supposed to do, it's his child, without him? Am I wrong?"

In order to encourage discussion about the issues raised by the voice mail, Williams posed the questions: "Who is at fault? And what about the responsibility factor?"

Upon receiving a call, Williams stated: "Don't say who you think it is." The caller responded that she "wouldn't know," and opined that both parties should take responsibility for the child. Another caller expressed an opinion that the woman involved was a "gold digger" and the man, a "target." A third caller commented, "If you play a man's game you got to pay a man's price," but also felt that the woman was at fault for her situation. Yet another caller phoned in to express remorse at her own adulterous affair.

Winston had been a program director/on-air personality for KJLH for 17 years before he resigned in October 2006 to work for a competitor, Radio One, Inc. Winston asserts that Morris expressed anger when he found out that Winston was speaking to representatives from Radio One, and that Winston would be sorry if he left KJLH to work for that entity.

Winston did not hear the original broadcast of the voicemail on the afternoon of April 18, 2007. However, on that afternoon, Winston's phone "rang off the hook" with calls from friends, family, colleagues, church members, and radio clients inquiring as to why KJLH would air something "so defamatory." According to Winston, "It was clear that the call concerned me because I was the only prominent radio personality that had recently left KJLH and working [*sic*] for another station." Winston states that the broadcast was "false." Since the broadcast, Winston has been "ridiculed" and has been

forced "to defend my name and previous good reputation." In addition, the circumstances have driven a "wedge between family members" and Winston and have taken a "heavy toll" on every aspect of his personal and professional life.

PROCEDURAL HISTORY

Winston filed this action on February 28, 2008. The first amended complaint (FAC), filed May 16, 2008, contains two causes of action against all defendants: defamation and IIED.

1. Special motion to strike filed by Taxi, Williams, Haydel, and Russell

On May 5, 2008, Taxi, Williams, Haydel, and Russell filed a special motion to strike pursuant to section 425.16.[2] The matter was heard on May 28, 2008. On June 23, 2008, the trial court issued a written ruling denying in part and granting in part the special motion to strike. The court first found that Taxi, Williams, Haydel and Russell met "their initial burden that this case fits within . . . section 425.16(e)" because "the called-in remarks occurred in the context of an on-air discussion of subjects of significant interest to the public." Next, the court analyzed whether Winston had demonstrated that he could prove a cause of action for defamation. The court concluded that he had. First, "[t]he broadcast was premised on falsehoods that would be known to be untrue . . . and would have been understood by listeners to be untrue." Thus, Winston had demonstrated that the broadcast was "provably false." In addition, Winston had presented sufficient evidence that the statements were "of and concerning him," despite the fact that his name was not mentioned. Finally, the court indicated its position that the statements were "maliciously aired with gross disregard for their truthfulness." However, the court concluded that Winston offered no evidence that Haydel or Russell participated in the publication of the statements, therefore those two defendants were dismissed.

On July 23, 2008, Taxi and Williams timely filed their notice of appeal. Winston filed his notice of cross-appeal on August 13, 2008.

---

[2] At the time that Taxi, Williams, Haydel, and Russell filed their special motion to strike, Morris had not yet been served with the complaint. As explained above, Morris later filed a separate special motion to strike.

2. Special motion to strike filed by Morris

Morris filed his special motion to strike on June 27, 2008. The matter was heard on July 22, 2008. The trial court issued a written ruling granting the motion on July 25, 2008. The court reasoned that Winston could not make out a prima facie case against Morris because "Morris was not involved in the subject broadcast." The court explained:

> "Plaintiff's . . . declaration in support of the motion does not provide evidence of involvement of defendant Morris in the subject events (i.e., before, during, and after). While plaintiff states that defendant Morris is an owner of the KJLH, there is no indication of involvement by him in the broadcast or ratification of it. At best, plaintiff presents supposition that is insufficient to defeat the present motion."

On September 23, 2008, Winston timely filed a notice of appeal from the trial court's order.

DISCUSSION

I. Applicable law and standard of review

A special motion to strike under section 425.16, also known as the "anti-SLAPP" statute, allows a defendant to seek early dismissal of a lawsuit involving a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

Actions subject to dismissal under section 425.16 include those based on any of the following acts: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right

of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

"A SLAPP is subject to a special motion to strike 'unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).) Thus, evaluation of an anti-SLAPP motion requires a two-step process in the trial court. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citations.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1035 (*Nygard*).) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

"'Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citations.]'" (*Nygard, supra*, 159 Cal.App.4th at p. 1036.)

II. The lawsuit is subject to section 425.16

A defendant in a SLAPP lawsuit bears the initial burden of showing that the suit "falls within the class of suits subject to a motion to strike under section 425.16." (*Nygard, supra*, 159 Cal.App.4th at p. 1036.) Thus, the burden falls on defendants to prove that the acts in question constitute protected speech as set forth in section 425.16, subdivision (e). Defendants argue that the call-in radio broadcast was an exercise of free speech concerning an issue of widespread public interest, and thus falls within section 425.16, subdivisions (e)(3) and (e)(4).

A "public forum" is traditionally defined as "a place that is open to the public where information is freely exchanged." (*Nygard, supra*, 159 Cal.App.4th at p. 1036.) A call-in radio broadcast qualifies as a public forum. (*Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064 (*Ingels*) ["We have no trouble concluding that respondents' activity in providing an open forum by means of a call-in radio talk show fits within the scope of section 425.16"].)

Winston does not dispute this general proposition. Instead, the parties focus their debate on the question of whether this particular broadcast addressed a topic of widespread public interest. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 (*Hall*).) As the *Hall* court explained, "[a] statement or other conduct is 'in connection with an issue of public interest' [citation] or 'in connection with a public issue or an issue of public interest' [citation] if the statement or conduct concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic. [Citation]." (*Id.* at p. 1347.)

In *Ingels*, the call-in radio show was addressing the topic of "relationships between men and women." (*Ingels, supra*, 129 Cal.App.4th at p. 1056.) Similarly, here, the broadcast at issue was directed at the subjects of marital infidelity and unplanned pregnancy, as well as the complications arising from what Williams referred to as "the responsibility factor." Like the *Ingels* court, we have no trouble concluding that the subject matter "'satisfies the requirement of being "in connection with an issue of public interest"'" as required by section 425.16, subdivisions (e)(3) and (e)(4). (*Ingels, supra*, at p. 1064.)

Winston attempts to distinguish *Ingels*, arguing that "[i]n *Ingels*, the widespread public interest was based on the popularity of the radio talk show, not the particular subject of the show." Our reading of *Ingels* is different. In determining that the broadcast concerned a matter of public interest, the *Ingels* court did not emphasize the popularity of the show but instead focused on the context of the claim: "the alleged tortious conduct occurred in connection with a live call-in radio talk show addressing subjects of interest to the public at large." (*Ingels, supra*, 129 Cal.App.4th at p. 1064.)

Winston cites no authority for the proposition that the popularity of the particular public forum, nor the number of listeners or range of broadcast, plays any role in a determination of whether the topic of discussion constitutes an "issue of public interest" under section 425.16, subdivisions (e)(3) or (e)(4).[3]

Winston further argues that the nature of the radio show in question, known as "Music and Mystery," was not that of a public forum for the debate of public issues. Instead, interested listeners would call in to provide their opinion regarding a particular "mystery." Again, we reject this distinction. The general description of the show is irrelevant where defendants have shown that, on this occasion, it was being used as a public forum for discussion of a topic of public interest.

Next, Winston argues that the focus of the broadcast was not the consequences of marital infidelity and unplanned pregnancy, but instead was "who was at fault between the two people." According to Winston, instead of discussing the societal impact of this behavior, the discussion "only focused on the alleged caller's acts."

Our review of the broadcast leads us to conclude otherwise. The anonymous caller does concede that she is using the station to try to get the attention of the "very prominent," unnamed married man who is the alleged father of her child. However, the broadcast of the voicemail was not an attempt to identify the individual or cast blame on either party to that particular relationship. Williams affirmatively informed the callers that the identity of the individuals described in the voicemail was not a subject of discussion. Upon answering the first call, Williams immediately stated: "Don't say who you think it is." Confirming that the identities of the individuals were not important to the on-air dialogue, the caller replied in an offhand manner, "Oh, I wouldn't know." And, while Williams did pose the question, "Who is at fault?" -- it is evident from the

---

3 In *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, the court discussed whether a radio broadcast concerning a participant on a television game show involved a topic of public interest. While the court noted that the television show "had proven successful in generating viewership and advertising revenue" (*id.* at p. 807), the popularity of the radio broadcast itself was not a factor in the court's determination that the matter fell within the purview of section 425.16.

broadcast as a whole that this question was not intended to target the individuals referenced in the voicemail, but to elicit general opinions regarding such a situation. The callers' responses similarly avoided any effort to identify the individuals, but spoke generally of their thoughts regarding the scenario described. The callers expressed a wide range of opinions: faulting both parties to the affair, providing advice, and even confessing to similar infidelities.

Adult relationships and unplanned pregnancy -- the topics discussed in the broadcast -- are topics of public interest. (See, e.g., *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1164 (*Annette F.*) ["the validity of second-parent adoptions was clearly a matter of public controversy"].)[4] The broadcast as a whole indicates an intent to spur discussion of the general topic of marital infidelity, not to target the specific individuals referenced in the broadcast or cast blame in that particular situation.[5]

The Legislature has declared that section 425.16 "shall be construed broadly." (§425.16, subd. (a); *Ingels, supra*, 129 Cal.App.4th at p. 1064.) The voicemail message was used as an example of the type of situation to be openly debated during the

---

[4] *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, is distinguishable. In *Weinberg*, plaintiff and defendant were both token collectors. After confronting plaintiff about a stolen token, the defendant published an advertisement in a monthly newsletter regarding the alleged theft of the token. While the advertisement did not identify the plaintiff as the culprit, defendant later identified plaintiff in written and oral communications with other token collectors. (*Id.* at pp. 1127-1128.) Defendant later published another statement and sent letters to other token collectors describing plaintiff as a thief and a liar. In determining that plaintiff's lawsuit was not subject to section 425.16, the Court of Appeal concluded that defendant "failed to demonstrate that his dispute with plaintiff was anything other than a private dispute between private parties. The fact that defendant allegedly was able to vilify plaintiff in the eyes of at least some people establishes only that he was at least partially successful in his campaign of vilification." (*Weinberg*, at p. 1134.) Here, in contrast, the subject of the broadcast was not "a private dispute between private parties." Instead, a single example was used to launch a discussion of subjects of widespread public interest.

[5] Winston argues that in order to fall within section 425.16, there must be a "connection between the public figure and the topic of discussion." This argument is unsupported by the authorities cited, therefore we reject it.

broadcast. As such, it was a mere sounding board for discussion. Indeed, the discussion that followed allowed callers to voice their opinions on who was at fault in such a situation, what a woman who finds herself in this position should do, and the impact of such behavior in the callers' own lives. Under the circumstances, we find that the broadcast concerned "a public issue or an issue of public interest" (§ 425.16, subd. (e)(4)) and was therefore subject to a motion to strike under section 425.16.[6]

III. Winston has not established a probability of success on the merits

We have determined that this lawsuit arises from activity protected by section 425.16. Next, we must consider whether Winston has demonstrated a probability of prevailing on his claims. (*Nygard, supra,* 159 Cal.App.4th at p. 1035.)

In order to establish a probability of success on the merits of his claims, Winston """"must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by [Winston] is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]"

---

6 Under *Flatley v. Mauro* (2006) 39 Cal.4th 299, a defendant is precluded from using section 425.16 to strike a plaintiff's action when the evidence conclusively establishes that the speech was illegal as a matter of law. Winston argues that the broadcast was illegal under 47 Code of Federal Regulations part 73.1206, therefore Code of Civil Procedure section 425.16 is inapplicable. We reject this argument because Winston has presented insufficient evidence to support a conclusive finding that a violation of the regulation has occurred. 47 Code of Federal Regulations part 73.1206 requires that, before broadcasting a telephone conversation or voice message, a "licensee" must "inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware . . . that it is being or likely will be broadcast." Winston has failed to conclusively establish that the caller in this case was unaware -- or could not have been presumed to be aware -- that her call would be broadcast.

[Citations.]'" (*Nygard, supra*, 159 Cal.App.4th at p. 1044.) In other words, we "must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment." (*Hall, supra*, 153 Cal.App.4th at p. 1346.)

A. Defamation

In an action for defamation, the plaintiff must show "'(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) In addition, a public figure who brings a defamation claim must also prove, by clear and convincing evidence, that the defendant acted with actual malice. Thus, in order to prevail on an anti-SLAPP motion, the plaintiff must "establish a probability that she will be able to produce clear and convincing evidence of actual malice." (*Annette F., supra*, 119 Cal.App.4th at p. 1167.)[7]

Winston cannot establish a probability of prevailing on his defamation claim as to any defendant. Because each defendant played a different role at KJLH, different legal analyses are required.

Haydel and Russell

Haydel was Williams's co-host at the time of the broadcast. Russell was employed by KJLH as a program director. Winston cannot establish a probability of prevailing on his defamation claims against these two individuals because he has not submitted competent evidence that they were responsible for the publication.

In order to establish that Haydel and Russell are personally liable for the allegedly defamatory broadcast, Winston must establish that they took "a *responsible* part in the publication." (*Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 852.) An individual

---

[7] The purpose behind the "actual malice" rule with respect to public figures is two-fold: first, "public figures are generally less vulnerable to injury from defamation," and second -- and more significantly -- "public figures are less deserving of protection than private persons because public figures . . . have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.' [Citations.]" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253 (*Reader's Digest*).)

is not liable for a publication if he or she "had no control" over the content. (*Ibid.*) The evidence shows that neither Haydel nor Russell had any control over the content of the broadcasts aired on Williams's show.

Williams's declaration confirmed that he alone was responsible for the broadcast in question. He testified that his practice was to "[check] the voice-mail messages that the station received on the hotline every 1-2 days in order to identify new topics" for the program, and that he "was the only person at KJLH who reviewed messages from listeners or knew the chosen topics before they were aired. Even Ms. Haydel, my co-host, did not review any original messages from listeners until they were broadcast during the show. This was because I wanted Ms. Haydel's reaction to be spontaneous."

Haydel testified that she "had not heard, and did not know the content of, the anonymous call until it was played on-air. My co-host, Lawrence Williams, always selected the calls or emails that we would discuss on the show, and never shared them with me before they were broadcast. This was to facilitate a natural and spontaneous response by me on-air." Similarly, Russell testified that "I did not know anything about the content of the April 18, 2007 show prior to its broadcast. I had not even heard about, let alone authorized the broadcast of, the anonymous call played on-air that day."

Winston has presented no evidence disputing this information. He makes no effort to challenge the statements of both Williams and Haydel that Haydel was never informed of the topics of discussion prior to a broadcast and had no control over their content. And he presents no evidence suggesting that Russell was involved in the subject broadcast or was even aware of it until it was over. Defendants' evidence is thus uncontradicted.

In support of his position that Haydel and Russell should be liable for the broadcast, Winston relies almost exclusively on the fact that the voicemail was aired twice.[8] Winston argues that Haydel and Russell knew of and participated in the second broadcast, which took place within approximately one hour of the first broadcast.

---

[8] Winston's statement that account executive Lauretta Roberts informed him that "the programming department knew about the broadcast" was excluded as hearsay.

Haydel and Russell contend that this argument was never raised in the trial court, thus they did not have an opportunity to present evidence in response. Generally, "appellants may not raise a factually novel legal theory of liability on appeal." (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9.)

Even if the argument could be raised for the first time on appeal, it is unconvincing. First, Winston presents no evidence that Russell heard the voicemail message the first time it was broadcast. Russell's declaration suggests that he was unaware of the content of the "April 18, 2007 show" prior to its broadcast. Because the "show" lasts for four hours, this would include both airings of the voicemail. Winston has presented no evidence suggesting that Russell was listening to the radio show the first time the voicemail was aired, or even the second time. And, while the evidence shows that Haydel heard the voicemail message the first time it was aired, Winston has failed to provide any evidence suggesting that she had any control over the content of the broadcast. Instead, the evidence shows that Williams alone had such control. In sum, Winston has failed to establish that either Haydel or Russell took a responsible part in the act of publication. One who is "not involved in the preparation, review or publication" of allegedly defamatory material cannot be subjected to liability for defamation. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 549.) For this reason, Winston's defamation claims against Haydel and Russell must fail.

Morris

Winston cannot establish a probability of prevailing in his defamation claim against Morris for similar reasons. Winston has presented no evidence that Morris personally participated in -- or even had knowledge of -- the broadcast at issue. Because the evidence shows that Morris was not personally responsible for the publication, he cannot be liable for any damages resulting from it.

Winston's evidence on this topic consists exclusively of conclusory statements from his own declaration. He states, "While Morris did not direct the day-to-day

---

Indeed, Roberts submitted a rebuttal declaration denying that she made any such statements to Winston.

operations of any particular show, it was very clear about his control over the station. It was well known and established throughout my employment that it was KJLH's policy that all accusatory material be preapproved by the Programming Department, which consisted of all department heads, including Aundrae Russell, who reported to Morris." In addition, Winston states, Morris "always required prior notification of any material against any person with whom he has had a personal relationship. Morris and I have had a personal relationship for more than 17 years." While Winston admits that "Morris did not determine any particular personality's airtime topics," but claims that "it is inconsistent with KJLH policy that Williams slipped the matter by Morris."

This evidence is insufficient to show that Morris had prior knowledge of the subject broadcast. Winston's general statements regarding Morris's "control" and "policies" are insufficient to establish that Morris had knowledge of, or participated in, the subject broadcast. Winston has submitted no evidence showing that Morris was at the station at the time of the broadcast, listened to the voicemail before it was aired, or played any role in the afternoon show on that particular date.[9]

Morris testified: "I had no knowledge of the content of the April 18, 2007 broadcast until after it aired. I was not involved in selecting or approving the content of on-air segments for the afternoon drive show. I did not authorize anyone at KJLH to air the segment at issue in this lawsuit. Moreover, I never authorized or instructed anyone at KJLH to publish any content about Winston, or to harm Winston in any way."

We conclude that Winston has failed to establish that Morris personally participated in the broadcast. He is not subject to personal liability because of his status as owner of KJLH, as Winston suggests. (See, e.g., *Matson v. Dvorak, supra*, 40 Cal.App.4th at p. 549 ["[O]ne whose only involvement in the publication of a libelous magazine article is ownership of shares in the publishing company cannot be held

---

9 Winston's brief states, without citation to the record, that Morris "was at the station that same day, and was listening to the broadcast." Because no evidence supports these statements, we do not consider them in determining whether Winston can make out a prima facie case against Morris.

personally liable for the defamatory article"].) Thus, Winston cannot prevail on a defamation claim against him.

Taxi and Williams

Taxi and Williams are the two defendants whose special motions to strike were denied by the trial court. Unlike Haydel, Russell and Morris, Taxi and Williams do not challenge their participation in the broadcast.[10] However, they challenge two other elements of Winston's defamation claim. First, they argue that Winston did not show that the statements were defamatory, because he did not show that the publication was *about him*. In addition, they argue that Winston failed to meet his burden of establishing that Williams acted with actual malice.

1. Whether the statement concerned Winston

Where, as here, the message did not expressly identify Winston, he must demonstrate that "the . . . statements are '"of and concerning"' him either by name or by 'clear implication.' [Citation.]" (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1404.) In *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, the Supreme Court determined that an author could not meet the "of and concerning requirement":

> "When, as in this case, the statement that is alleged to be injuriously false concerns a group--here, books currently in print and their authors--the plaintiff faces a 'difficult and sometimes insurmountable task. If the group is small and its members easily ascertainable, [the] plaintiff[] may succeed. But where the group is large--in general, any group numbering over twenty-five members--the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them.' [Citations.]"

(*Blatty, supra*, at p. 1046.)

Here, the description given by the anonymous caller describing a "very prominent" married man who used to work at KJLH and is "still on the radio," could only pertain to a limited number of individuals. Winston testified that, on the date of the

---

[10] For the purposes of this analysis, we assume that Williams's actions may be imputed to Taxi.

broadcast, his "telephone rang off the hook with calls from friends, family, colleagues, church members and radio clients inquiring as to why Defendant KJLH would [air] something so defamatory. . . . [I]t was clear that everyone believed that the broadcast pertained to me and was true." [11] Winston also presented the declaration of Diana Esquivel, who regularly listens to KJLH. She heard the broadcast on April 18, 2007, and stated that "it was apparent to me that the caller was referring to Clifton Winston." Williams testified that he did not know who the voice message concerned, and was "aware of at least seven individuals who had been employed by KJLH and were presently broadcasting on other radio stations, including Frankie Ross, Jeff Gill, Mark Keene, JJ Johnson, Jay Michaels, Rico Reed and Plaintiff Clifton Winston." Winston, however, presented conflicting evidence indicating that the individual described could not be any of the individuals named by Williams because "none of the . . . statements in Williams' declaration pertaining to the other personalities coincide with the alleged caller's statements about the man."

Under the standards of review set forth above, we do not weigh this competing evidence. Instead, we determine only whether "'defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support.'" (*Nygard, supra*, 159 Cal.App.4th at p. 1044.) It does not. We must credit Winston's evidence, thus, we conclude that Winston has made a sufficient evidentiary showing on this element of his defamation claim.

---

11 We reject Taxi and Williams's evidentiary challenges to this statement, which are reviewed for abuse of discretion. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) Taxi and Williams challenged Winston's statement that, the afternoon of the broadcast, his telephone "rang off the hook" with calls from friends and family inquiring about the broadcast, which made it "clear to [Winston] that everyone believed that the broadcast pertained to me and was true." The trial court admitted this "opinion" as a reflection of Winston's state of mind or belief at the time that he received the phone calls. (Evid. Code, § 1250.)

2. Actual malice

Having determined that Winston has made a prima facie showing that the broadcast concerned him, we must now analyze whether Winston has made the required showing of actual malice. As set forth above, a public figure who brings a defamation action must prove actual malice by clear and convincing evidence. (*Annette F., supra*, 119 Cal.App.4th at p. 1167.)

A public figure need not have achieved nationwide fame; it is sufficient that he occupy a position of "general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 205.) Winston does not dispute that he is a public figure or that the "actual malice" requirement must be met before he can show a probability of prevailing on his defamation claim.

In order to establish actual malice, Winston must show that the allegedly defamatory statement was made "'with knowledge that it was false or with reckless disregard of whether it was false or not.'" (*Annette F., supra*, 119 Cal.App.4th at p. 1167.) "'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' [Citation.]" (*Ibid.*) "Gross or even extreme negligence will not suffice to establish actual malice; the defendant must have made the statement with knowledge that the statement was false or with 'actual doubt concerning the truth of the publication.'" (*Ibid.*, citing *Reader's Digest, supra*, 37 Cal.3d at p. 259, fn. 11.)

The existence of actual malice is determined by a "subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. [Citation.] This test directs attention to the 'defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff.' [Citation.]" (*Reader's Digest, supra*, 37 Cal.3d at p. 257.) "[A]ctual malice can be proved by circumstantial evidence," such as "[a] failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]." (*Id.* at pp. 257-258.)

These factors "may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." (*Id.* at p. 258.)

In analyzing whether Winston has made a sufficient showing of actual malice, we "must take into consideration the applicable burden of proof." (*Annette F., supra,* 119 Cal.App.4th at p. 1166.) Thus, we must determine whether Winston has established "a probability that [he] will be able to produce clear and convincing evidence of actual malice." (*Id.* at p. 1167.) "'The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind. [Citations.]'" (*Ibid.*)

We have separated Winston's evidence of actual malice into four different categories for easier analysis. For the purposes of this analysis, we assume that Williams was aware that the broadcast concerned Winston, despite the fact that he denies such awareness.

a. Evidence of anger and hostility

Winston's evidence of actual malice focuses mainly on anger and hostility exhibited by Morris when Winston left his employment with KJLH. Winston declared that, before he left KJLH, he was "the most popular on-air personality" for the station. When Radio One approached Winston, Morris expressed his anger. He implied that Winston knew that Radio One's owner was trying to "run his station off the air." Morris told Winston "that if I went to work for Radio One, I would be so sorry and he would never speak to me again." When Winston left in October 2006, Morris was angry with him. Winston thought that their differences had been resolved, until the broadcast occurred. Then it was "apparent that [Morris] and others at KJLH wanted to 'make me sorry' for leaving."

Notably, this evidence only concerns Morris. Winston has not provided any evidence of anger or hostility on the part of Williams. Because we have determined that Williams was solely responsible for the broadcast, Taxi's liability must be derivative of Williams's actions. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347 ["A corporation can only act through individuals [citation], so it can only be liable for

defamation derivatively"].) Morris was not personally responsible for the broadcast therefore his anger at Winston may not form the basis of a finding of actual malice on the part of Williams or Taxi.

b. Evidence of alteration of broadcast

Winston attempts to present evidence of how Williams altered the voicemail as evidence of actual malice. After hearing the broadcast from a tape that he obtained, Winston called Williams, who told him that he did Winston a "favor" by editing Winston's name out of the recording.[12] In addition, Winston argues, Williams admitted that he distorted the woman's voice "so there would be no lawsuit." According to Winston, these actions show Williams's "knowledge" that he was airing "defamatory statements pertaining to Winston." We disagree. The fact that Williams made efforts to obscure the identities of the individuals involved does not imply that he had knowledge that the statements in the voice message were false. Instead, it simply shows that he was concerned with preventing disclosure of those individuals' identities. (See, e.g., *Taus v. Loftus, supra*, 40 Cal.4th at p. 722 [defendant's decision to conceal plaintiff's identity "belie[s] the claim that [defendant] acted out of hatred or ill will toward plaintiff"].)

Finally, Winston states that "Williams and Haydel aired the [b]roadcast twice because no one heard it the first time." As is apparent from the tape, Williams felt that the voice was overly distorted, and thus unintelligible, the first time he played the voicemail. The fact that the message was aired twice does not indicate that any defendant had knowledge of its falsity; therefore it is of no consequence to our determination of actual malice.

c. Evidence of Winston's beliefs as to broadcast

Winston also attempts to show actual malice by stating his personal beliefs as to the defendants' purpose in airing the broadcast. Winston stated that "[d]efendants knew the information was false and only aired the broadcast to harm my ratings by portraying me as a womanizing deadbeat dad. [Morris] was concerned about being run out of

---

12 Williams disputes this statement, claiming that the caller never identified the man she was referring to by name.

business by Ms. Hughes." Winston further stated that he "believe[d] the broadcast was fabricated and the voice distorted because it was an inside job."

Over defendants' objections, the trial court ruled that these statements were admissible as Winston's "personal opinions." However, statements regarding Winston's personal opinions do not satisfy his burden of showing actual malice. Conclusory and speculative allegations are insufficient to meet a plaintiff's burden of setting forth a prima facie case. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593 ["A 'prima facie' showing refers to those *facts* which will sustain a favorable decision if the evidence submitted in support of the allegations . . . is credited." (Italics added.) A party cannot "get by with general, conclusory allegations"].) Winston has cited no facts supporting his conclusion that Williams "knew the information was false" or that the broadcast was "fabricated." Without supporting evidence, his opinion on these subjects does not aid in his effort show clear and convincing evidence of actual malice.

d. Evidence of Williams's subjective state of mind

The existence of actual malice is determined by a "subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. [Citation.]" (*Reader's Digest, supra*, 37 Cal.3d at p. 257.)

Winston states, without citation to the record, that "Williams admits that he never confirmed the story for either veracity or to obtain the identity of the caller." Even assuming that Williams knew the caller to be referencing Winston, and that Williams never verified her story, Williams's failure to seek confirmation of the story's veracity is not clear and convincing evidence of actual malice. Under the standard set forth by the Supreme Court, Williams had to have knowledge that the statement was false or "actual doubt concerning the truth of the publication." (*Reader's Digest, supra*, 37 Cal.3d at p. 259, fn. 11.) "The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.]" (*Id.* at p. 258.)

Under the circumstances, Williams's failure to investigate the caller's statement does not constitute clear and convincing evidence of actual malice. Williams did not

obtain the information regarding the affair and pregnancy from a third party informant, but from the pregnant woman herself. It is difficult to think of a better source for verification. And Winston does not suggest that Williams had any specific reason to doubt the caller's veracity. Thus, the fact that Williams did not undertake further investigation of the caller's statements does not constitute clear and convincing evidence of actual malice.

"Gross or even extreme negligence will not suffice to establish actual malice." (*Annette F., supra*, 119 Cal.App.4th at p. 1167.) At best, Williams's failure to confirm the caller's story was negligent behavior. Evidence of such negligence would not satisfy Winston's burden to prove, by clear and convincing evidence, Williams's "knowledge" of the story's falsity or that he entertained any "actual doubt" concerning its truth.[13]

e. Summary of actual malice evidence

We have determined that Winston's evidence of alteration of the voicemail, and Winston's conclusory allegations as to his beliefs regarding the genesis of the broadcast, are irrelevant to our analysis of actual malice. That leaves Winston's evidence of anger and hostility on the part of Morris, on which he greatly relies; and his statement that Williams failed to investigate the caller's allegations.

Again, the key issue is the defendants' belief as to the truth or falsity of the statement. "'The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind. [Citations.]'" (*Annette F., supra,* 119 Cal.App.4th at p. 1167.) We find that Winston has failed to submit evidence which commands such unhesitating assent. The evidence of Morris's anger at Winston is irrelevant to the question of whether Williams had knowledge of the falsity of the caller's story. And while Williams's failure to confirm the caller's story may have been

---

13 Williams's statements that he had been told that Winston engaged in extramarital affairs were excluded by the trial court as hearsay. Williams challenges these evidentiary rulings, claiming that the statements were relevant to establish Williams's state of mind. Given our conclusion that Winston has not shown clear and convincing evidence that the broadcast was made with actual malice, we find that we need not reach this question.

negligent, even gross negligence is insufficient to establish actual malice. (*Annette F.*, at p. 1167.)

We find that Winston has failed to show actual malice on the part of Williams. Because he cannot establish this necessary element of his prima facie case, his action for defamation against Williams and Taxi must be dismissed.

B. IIED

We have determined that Winston's defamation cause of action must be dismissed under section 425.16. Under the Uniform Single Publication Act (USPA) (Civ. Code, § 3425.1 et seq.), Winston's IIED claim must also fail.

The USPA provides:

> "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture."

(Civ. Code., § 3425.3.)

This rule has been interpreted to limit plaintiffs to one cause of action where the plaintiffs' claims arise from a single publication. In addition, "[i]n light of the significant First Amendment issues" implicated by the claims covered by the statute, "courts in California and other jurisdictions have interpreted the uniform act expansively." (*Long v. The Walt Disney Co.* (2004) 116 Cal.App.4th 868, 871.) In *Strick v. Superior Court* (1983) 143 Cal.App.3d 916 (*Strick*), the court determined that a plaintiff's causes of action for fraud and deceit, which were grounded on the same facts as the plaintiff's libel cause of action, should be dismissed. The court explained:

> "Here, the *harm* (damage) allegedly sustained by petitioners in their third and fourth tort causes of action for fraud and deceit is the same as that which could be caused by '*libel or slander or invasion of privacy*.' The gist of all six causes of action is based on the *contents* of the *mass publication* of an article in the April 1980 issue of Los Angeles Magazine . . . to permit plaintiffs to pursue an independent tort claim based on fraud

> and deceit . . . which must resort to the *contents* of the same allegedly mass communicated libelous article would nullify the clear language and applicability of Civil Code section 3425.3 . . . ."

(*Strick, supra*, at pp. 924-925.)

The same result was reached in *M. G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, where the court, citing Civil Code section 3425.3, dismissed the plaintiffs' emotional distress claims on the grounds that they were "cumulative and pleading them as separate torts may add nothing to plaintiffs' claim for invasion of privacy." (*M.G.*, at p. 637.)

Winston seeks to avoid application of Civil Code section 3425.3 by arguing that his IIED claim is distinct from his defamation claim because it is based on "the act of fabricating a story." Citing *Baugh v. CBS, Inc.* (1993) 828 F.Supp.745 (*Baugh*), Winston argues that a claim may remain viable "to the extent that it relies upon conduct outside the actual broadcast." Winston insists that the station "cannot distort a voice-mail message through a synthesizer," thus Williams "fabricated the story intending to harm Winston's reputation."[14]

We reject Winston's attempt to distinguish his IIED claim. As set forth in *Strick*, Civil Code section 3425.3 applies to bar the claim if the "gist" of the cause of action is based on the contents of the publication at issue in the defamation claim. Winston's IIED claim is grounded in the publication of the statements on the radio, not on Williams's alleged fabrication.[15] Thus, it is barred by the USPA. To find otherwise would "nullify

---

[14] Winston has not produced any competent evidence to support his allegation that the voicemail message was "fabricated." Thus, Winston's arguments based on the alleged "fabrication" of the message cannot defeat the special motion to strike.

[15] In contrast, the IIED claims in *Baugh* survived because they were grounded on the defendants' entrance into the plaintiff's home during a time of extreme emotional vulnerability and defendants' misrepresentation of their identities in order to gain her consent to videotaping. (*Baugh, supra*, 828 F.Supp. at p. 758.) Thus, those IIED claims were based on outrageous conduct that was independently actionable without reference to the ultimate broadcast of those videotapes. In contrast, Winston's IIED claim is not

the clear language and applicability of Civil Code section 3425.3." (*Strick, supra,* 143 Cal.App.3d at pp. 924-925.)

DISPOSITION

The order denying the special motion to strike as to Taxi and Williams is reversed. The orders granting the special motions to strike as to Haydel, Russell, and Morris are affirmed. Taxi, Williams, Haydel, Russell, and Morris are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST

---

independently actionable without reference to the publication of the allegedly fabricated statements.